

REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
CIVIL CASE NO.202 OF 2003**

NATIONAL BANK OF KENYA LTD.....PLAINTIFF

VERSUS

DAVID MWANIKI KINUTHIA.....1ST DEFENDANT

JUNIOR GIRLS ACADEMY NAIVASHA LTD.....2ND DEFENDANT

R U L I N G

The Plaintiff herein seeks summary judgment against the Defendants jointly and severally for the sum of Kshs.1,500,000/00 with interest thereon at 23% per annum from 26th February, 1998 until payment in full. This is by Notice of Motion dated 15th April, 2004 brought under Order 35, rule 1 of the Civil Procedure Rules (the Rules). That rule enables a Plaintiff who seeks judgment for a liquidated demand with or without interest, *inter alia*, to apply for summary judgment for the amount claimed, or part thereof, and interest, where the Defendant has appeared. The application must be supported by an affidavit either of the Plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed. Under rule 2 of the same Order the Defendant may in his turn show either by affidavit or by oral evidence or otherwise that he should have leave to defend the suit.

As set out in paragraphs 4, 5, 6, 7, 9, 10 and 11 of the amended plaint dated 24th February, 2004, the Plaintiff's claim against the Defendants is the sum of Kshs.3,033,029/95, plus interest thereon at 23% per annum from 1st September, 2000 until payment in full, the same being in respect to a term loan of Kshs.1,500,000/00 advanced to the 1st Defendant, **DAVID MWANIKI KINUTHIA**, in 1998, and guaranteed by the 2nd Defendant, **JUNIOR GIRLS ACADEMY NAIVASHA LIMITED**. In their amended statement of defence dated 5th April, 2004 it is denied that any money was advanced at all to the Defendants. It is further averred that if such money was advanced, it was so advanced to the 2nd Defendant. It is also admitted, albeit without prejudice to the said denial, that indeed the sum of Kshs.1,500,000/00 was advanced to the 2nd Defendant but instead of the agreed sum of Kshs.3,000,000/00 that was to be advanced. It is further pleaded that there was therefore a failure of sufficient consideration on the Plaintiff's part. But it has not been pleaded that the 2nd Defendant is thus not liable to repay the advanced sum.

PETER KARIUKI THANDE, the manager of the Limuru Branch of the Plaintiff, the branch that dealt with the Defendants, has sworn an affidavit dated 13th May, 2004 in support of the application. To it are annexed copies of letters by the 1st Defendant addressed to the Plaintiff asking for two advancements totaling Kshs.1,500,000/00. Also annexed are copies of two agreements dated 9th January and 26th February, 1998 by which the Plaintiff advanced to the 1st Defendant the total sum of Kshs.1,500,000/00. Those agreements set out the terms and conditions of the advancements, including the rate of interest chargeable. There is also annexed a copy of a guarantee for the said sum of Kshs.1,500,000/00. It is not fully legible. But a fairer copy was provided vide a supplementary affidavit sworn on 1st July, 2004. The guarantee was executed by the 2nd Defendant through its officials.

There are other correspondences between the Plaintiff and the 1st Defendant exhibited. One of them is a letter dated 20th January, 2000 addressed by 1st Defendant to the Plaintiff. In it he acknowledges the loan of Kshs.1,500,000/00 advanced to him. He also acknowledges a further debt of Kshs.1,426,807/35 transferred from the Plaintiff's Narok Branch. Further confirmation that the sum of Kshs.1,500,000/00 was indeed advanced to the 1st Defendant can be found in bank statements, also annexed to the supporting affidavit.

In the replying affidavit sworn by the 1st Defendant on 11th June, 2004 on his own behalf and on the 2nd Defendant's behalf there is no denial that the sum of Kshs.1,500,000/00 was advanced to him. He has not stated that he has paid that sum or any part thereof. What he does is to complain that the interest charged at 31% and 23% per annum is "*ridiculous, oppressive and detrimental*". He also complains that his Narok debt has been consolidated with the Limuru one, thus rendering his effort to "*clear the loan balance very confusing, untenablefrustrating and economically impossible*".

The respective submissions of the learned counsels appearing were along the abovestated positions of the parties, and I have given them due consideration. I have also read the various cases cited. Whether or not to grant summary judgment is an exercise of discretion. The court will grant summary judgment only where it is clear and plain that the Defendant is truly and justly indebted to the Plaintiff. The Plaintiff or some other person must swear positively to the facts verifying the cause of action and any amount claimed. Once that is done the Defendant can resist summary judgment only by showing by affidavit or by oral evidence or otherwise that he should have leave to defend the suit. In other words his statement of defence, either already filed or to be filed, must disclose a triable issue or issues. Or he may by his replying affidavit or by some other way show that his intended defence will disclose a triable issue or issues. In this regard a mere denial is not a triable issue.

I have considered the affidavit sworn in support of the application and that sworn in reply. I have also read the amended plaint and the amended defence. From the documents annexed to the supporting affidavit and the admissions made in the amended defence, albeit made without prejudice to the denial, there cannot be any doubt at all that the Plaintiff advanced to the 1st Defendant the total sum of Kshs.1,500,000/00 in early 1998. Payment was guaranteed by the 2nd Defendant in a duly executed guarantee. The 1st Defendant has not averred that he has repaid this sum, or any part thereof. He has complained about the rate of interest charged, but the same has been charged as contracted. He has also complained about his debt at Narok being consolidated with his debt at Limuru. But in his letter dated 20th January, 2000 already referred to elsewhere above he makes no such complaint and instead seeks yet further loans from the Plaintiff.

From the material placed before me I am satisfied that the Defendants are truly and justly indebted to the Plaintiff in the sum of Kshs.1,500,000/00 plus interest thereon as contracted. The amended defence raises no triable issue in regard to that sum. Nor has it been shown by the replying affidavit or by the submissions of the learned counsel for the Defendants that they should have leave to defend the suit. I will therefore enter judgment for the Plaintiff against the Defendants jointly and severally for the sum of Kshs.1,500,000/00 with interest thereon at 23% per annum from 26th February, 1998 until payment in full. The balance of the claim shall go to trial. The Plaintiff will have the costs of the suit (inclusive of the costs of this application). Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2004.

H. P. G. WAWERU

JUDGE

DELIVERY THIS 24TH DAY OF SEPTEMBER, 2004.